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No. 02-1189

IN THE
SUPREME COURT OF THE UNITED STATES

RICARDO ORTIZ,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari
to the Court of Criminal Appeals of Texas

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether a Texas statute which permits the prosecution to assert a challenge for cause to a prospective capital juror where "the juror has conscientious scruples in regard to the infliction of the punishment of death" is facially invalid under the Sixth Amendment where the state courts have construed the statute as a basis for disqualification only to the extent constitutionally permitted by *Wainwright v. Witt*, 469 U.S. 412 (1985).

2. Whether the lower court erred by rejecting Petitioner's allegation that his trial attorney rendered ineffective assistance of counsel when he did not object to the prosecution's challenges for cause to thirteen prospective jurors who indicated that they opposed the death penalty in all circumstances.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Ricardo Ortiz was convicted and sentenced to death by a Texas jury for the capital murder of fellow jail inmate Gerardo Garcia. The Texas Court of Criminal Appeals affirmed Ortiz' conviction and death sentence on direct appeal, and he now seeks certiorari review from this Court. In particular, Ortiz alleges that the Texas statute governing challenges for cause to prospective capital jurors who harbor "conscientious scruples" against the death penalty is facially unconstitutional in light of this Court's decisions in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). He also complains that his trial attorney rendered ineffective assistance of counsel when he did not object to the prosecution's challenges for cause to thirteen prospective jurors who indicated that they opposed capital punishment and could not return a death sentence. However, as discussed below, the Court of Criminal Appeals correctly concluded that Ortiz' arguments were without merit. Ortiz does not present a compelling reason for this Court to review his claims and certiorari review should be denied.

STATEMENT OF THE CASE

On August 17, 1997, Gerardo Garcia died in the El Paso County Jail of a massive heroin overdose. The evidence adduced at trial established that the heroin had been involuntarily-injected into Garcia by Ortiz, who was a high-ranking member of the Texas Syndicate prison gang, because Ortiz believed that Garcia had implicated him in various bank robberies. According to one witness, Ortiz indicated that he used heroin to kill Garcia in order to make his death look like a suicide.

I. Jury Selection

Jury selection for Ortiz' trial began on April 20, 1999. 11 RR 6.[1] Prior to individual voir dire examination by the parties, the trial court addressed the assembled venire and discussed various questions included on the juror questionnaires. *Id.* at 6-97. Among other things, the trial court inquired whether any of the jurors opposed the death penalty in all cases:

> I am now going to ask you some questions about your convictions regarding the death penalty. Be assured that I am not now assuming that you will find the defendant guilty of capital murder or of any other crime in this case. Nevertheless, it is necessary to learn your state of mind about capital punishment in general, to determine whether you have an open mind as regards what might be a just and proper sentence in a capital case if the defendant in that case is found guilty as charged.
>
> So I am asking about your state of mind regarding capital punishment in general. I am not asking in this next question what you think would be a just penalty in this case or any particular case. . . . I am asking, rather, whether for religious or philosophical or any other reason you believe that the death penalty should never be inflicted in any case, regardless of what the evidence might be.
>
> In answering this next question, keep in mind that the circumstances and motives for the commission of crimes, including capital murder, are unlimited. Place a check mark by your answer, yes or no. Do you have conscientious scruples in regard to the infliction of death for a person

---

[1] "RR" refers to the "Reporters Record" of transcribed trial proceedings, preceded by volume number and followed by page numbers.

convicted of capital murder? Yes or no?

If you have answered the proceeding question yes, come up to the bench now.

Id. at 65-66. Twenty venire members came forward in response to the court's question and nineteen of those were ultimately excused from jury service based on the prosecution's challenge for cause. *Id.* at 66-81. Of those nineteen, defense counsel only raised an objection to the disqualification of two prospective jurors. *Id.* at 77-80.

Of the seventeen jurors excused for cause where defense counsel did not object, Ortiz cites the testimony of the following thirteen venire members in his petition for writ of certiorari.

1. Venire member Reid

[Defense counsel]: Mr. Reid.

THE COURT: Yes, sir.

[Juror]: In regards to the question you just asked –

THE COURT: Yes.

[Juror]: – about the death penalty, I checked on the yes.

THE COURT: You have conscientious scruples regarding –

[Juror]: Yes.

THE COURT: Anybody want to ask him any questions? Take your seat, sir.

State challenge?

[Prosecutor]: Yes.

THE COURT: All right. Court grants the challenge. Next person.

11 RR 66-67.

2. Venire member Bonilla

[Juror]: 57, Elizabeth Bonilla. I think only God has a right to take someone's life.

THE COURT: You have conscientious scruples against infliction of the death penalty in all cases?

Anybody want to ask questions?

[Defense counsel]: No questions.

[Prosecutor]: No.

THE COURT: Take your seat, ma'am.

[Prosecutor]: Challenge.

THE COURT: Court grants the State's challenge.

11 RR 67.

3. Venire member Berlit

[Juror]: Chris Berlit, B-E-R-L-I-T, number 83. I do have reservations to the death penalty.

THE COURT: What do you mean by "reservations"?

[Juror]: I've been born, raised and educated in Europe, and I believe that an appropriate punishment would be life in prison.

THE COURT: The question not really is that. Do you believe the death penalty unjustified in all cases?

[Juror]: Yes. Yes, sir.

THE COURT: Questions?

[Prosecutor]: State challenges.

THE COURT: State's challenge is granted.

11 RR 69.

4. Venire member Reta

[Juror]: Number 127, Diana Reta.

[Prosecutor]: 127, Judge.

[Juror]: And I answered yes to conscientious scruples in regard to the death penalty.

THE COURT: Is this a religious conviction or –

[Juror]: It's just a moral, personal –

THE COURT: You're opposed to the death penalty in all cases?

[Juror]: Yes, sir.

THE COURT: Questions, State?

[Prosecutor]: No, Your Honor.

THE COURT: Defense?

[Defense counsel]: No questions, Your Honor.

THE COURT: Next person.

[Prosecutor]: State is going to challenge that juror.

THE COURT: Granted.

11 RR 69-70.

5. Venire member Lopez

[Juror]: 132. Yvonne Lopez.

THE COURT: Ms. Lopez, what is your statement to the Court?

[Juror]: I would have a problem with the death penalty.

THE COURT: Anybody would have a problem with it.

[Juror]: Personally, I would have a problem. Yes, I'm a Catholic, and only God gives life, and only God takes away life.

THE COURT: I'm just trying to tell you, it's a problem for anybody. But do you have conscientious scruples against the death penalty in –

[Juror]: Yes.

THE COURT: – any and all cases?

[Juror]: Most probably in all cases.

THE COURT: In all cases?

[Juror]: I think so. I've never been faced with it, but I think I would have a problem.

THE COURT: It's not a question of having a problem. I'm not trying to –

[Juror]: I answered.

THE COURT: I'm not trying to contradict you. Anybody that has any sensibility would have a problem with the issue. The question is, are you opposed to the death penalty in all cases, regardless

of what the facts might show?

[Juror]: Yes.

THE COURT: Questions?

[Prosecutor]: No questions.

[Prosecutor]: No.

[Defense counsel]: No questions.

THE COURT: Take your seat.

[Prosecutor]: State challenges. Judge, State challenged that last juror.

THE COURT: All right. Granted. I've forgotten the name.

11 RR 70-72.

6. Venire member Herrick

[Juror]: Jeffery Herrick, 123.

THE COURT: Mr. Herrick, you have – I'm not going put [*sic*] words in your mouth.

[Juror]: I'm opposed to the death penalty based on my convictions as a Quaker.

THE COURT: Is that in any and all cases?

[Juror]: Yes.

THE COURT: Questions?

[Prosecutor]: I think he'd been previously excused.

[Prosecutor]: No, he was not.

[Juror]: No, I just asked for permission to come in late.

THE COURT: Have your seat, sir.

[Prosecutor]: Move to challenge him, Your Honor.

THE COURT: Granted.

11 RR 72-73.

7. Venire member Escamilla

[Juror]: 56, Robert Escamilla.

THE COURT: Yes, sir.

[Juror]: I don't believe in the death penalty.

THE COURT: You don't believe it's justified in any case?

[Juror]: No, sir.

[Prosecutor]: No questions.

[Defense counsel]: No questions.

[Prosecutor]: He answered affirmatively.

THE COURT: He said he didn't believe it was justified in any case.

[Prosecutor]: We have no questions.

[Prosecutor]: State challenges.

THE COURT: Granted.

11 RR 74.

8. Venire member Cortinas

[Juror]: Dolores Cortinas, juror 97. Sir, I do not believe in the death penalty.

THE COURT: You do not believe in the death

penalty for any case whatsoever?

[Juror]: No, sir.

[Prosecutor]: No questions, Your Honor.

[Defense counsel]: No questions.

THE COURT: You may take your seat.

[Prosecutor]: State challenges.

THE COURT: All right. Granted.

11 RR 74-75.

9. Venire member Estala

[Juror]: Andre Estala, number 11. And I do have a conscientious scruple about this.

THE COURT: What is your statement about the death penalty?

[Juror]: I don't believe in it, sir, in any degree.

THE COURT: In any kind of case whatsoever?

[Juror]: That's correct.

THE COURT: You believe it's never justified?

[Juror]: Never justified.

[Prosecutor]: No questions, Your Honor.

[Defense counsel]: No questions.

THE COURT: You may return to your seat.

[Prosecutor]: State moves to challenge.

THE COURT: Granted.

11 RR 75-76.

10. Venire member Portillo

[Juror]: Jorge Portillo, 154.

THE COURT: You are Jorge Portillo. What is your statement on the death penalty?

[Juror]: I don't believe it's right.

THE COURT: Never justified under any circumstances?

[Juror]: Two wrongs do not make a right, sir.

[Prosecutor]: No questions.

[Defense counsel]: No questions.

THE COURT: You may take a seat.

[Prosecutor]: State challenges.

THE COURT: All right.

[Prosecutor]: Is that granted – I'm sorry – on the last juror?

THE COURT: Granted.

11 RR 76.

11. Venire member Gallegos

[Juror]: Rose Gallegos, number 112.

THE COURT: Make your statement as regards the death penalty, Mrs. Gallegos.

[Juror]: As a practicing Catholic, I do not believe in the death penalty.

THE COURT: You don't believe it is justified in any case whatever?

[Juror]: No, sir.

[Prosecutor]: No questions.

[Defense counsel]: No questions, Your Honor.

THE COURT: Take your seat, please, ma'am.

[Prosecutor]: State will challenge.

THE COURT: You do challenge?

[Prosecutor]: Yes.

THE COURT: Granted.

11 RR 76-77.

12. Venire member Palomo

[Juror]: Number 142.

THE COURT: You are Ms. Palomo?

[Juror]: Yes. I oppose the death penalty. I believe that the Lord gives us life, and he's the only one that's supposed to –

THE COURT: You're opposed to the death penalty, no matter the circumstances?

[Juror]: Yes. Yes.

[Prosecutor]: No questions.

[Defense counsel]: No questions, Your Honor.

THE COURT: Take your seat, please, ma'am.

[Prosecutor]: State challenges this juror.

THE COURT: Granted.

11 RR 77.

13. Venire member Caballero

[Juror]: Adriana Caballero, 108.

> THE COURT: Make your statement as to what – make your statement. What is your belief about the death penalty?
>
> [Juror]: I am strongly opposed to the death penalty.
>
> THE COURT: You think that the death penalty should never be inflicted in any case whatsoever, regardless of the facts?
>
> [Juror]: Yes.
>
> [Prosecutor]: No questions.
>
> [Defense counsel]: No questions.
>
> THE COURT: You may take your seat.
>
> [Prosecutor]: State would challenge, Your Honor.
>
> THE COURT: Granted.

11 RR 80-81.

II. Disposition Below

On appeal to the Court of Criminal Appeals, Ortiz argued for the first time that a Texas statute permitting disqualification of capital jurors who have "conscientious scruples in regard to the infliction of the punishment of death for crime" was facially unconstitutional under the Sixth Amendment. *See* Appeal Brief at 69-73, *Ortiz v. State*, No. 73,692 (Tex. Crim. App. filed June 25, 2001). In particular, he complained that the statute was inconsistent with this Court's decisions in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). *Id.* However, the state court rejected this facial challenge, noting that it had previously held that the statute provided a means for disqualification "'only to the extent constitutionally permitted by *Witt*.'" *Ortiz v. State*, 93 S.W.3d 79, 88 (Tex. Crim. App. 2002) (quoting *Ramos v. State*, 934 S.W.2d 358, 366 (Tex. Crim. App.

1996)). The court therefore found that, "[h]aving already narrowed the scope of the statute to what is constitutionally permissible, we perceive no further basis for complaint." *Id.*

Ortiz also contended that, in his case in particular, the thirteen jurors cited above were impermissibly excused from jury service in violation of *Witherspoon* and *Witt*. *See* Appeal Brief at 73-77, *Ortiz*, *supra*. However, the Texas court concluded that these allegations were not preserved for appellate review because "[a] party must object to the granting of a challenge for cause before he can complain of that action on appeal." *Ortiz*, 93 S.W.3d at 88 (footnote omitted). It therefore declined to reach the merits of Ortiz' constitutional complaint.

In an apparent attempt to circumvent the procedural bar, Ortiz also argued that his trial attorney's failure to object to the prosecution's challenges for cause to the excused venire members constituted ineffective assistance of counsel. *See* Appeal Brief at 119-24, *Ortiz*, *supra*. However, the Court of Criminal Appeals declined to find a Sixth Amendment violation on the record presented. *Ortiz*, 93 S.W.3d at 88-89. The court noted that it was "possible for counsel to have legitimate reasons for declining to object" to the prosecution's challenges. *Id.* at 89. Because the record was silent regarding why counsel chose not to object to disqualification of the thirteen venire members cited by Ortiz, the court stated that it would "defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal." *Id.*

ARGUMENT

I. The Questions Presented For Review Are Unworthy Of The Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10. In the instant case, Ortiz fails to advance a "compelling reason" for this Court to review his case, and none exists. Indeed, the opinion

issued by the lower court involved only a proper and straightforward application of established constitutional principles. Moreover, this Court does not have jurisdiction to review those arguments which the Texas court found were defaulted pursuant to an adequate and independent state procedural bar. The petition therefore presents no important question of law to justify the exercise of this Court's certiorari jurisdiction.

II. The Texas Statute Permitting The Prosecution To Challenge A Prospective Capital Juror For Cause Where The Juror Voices "Conscientious Scruples" Against The Death Penalty Is Not Unconstitutional.

In Ortiz' first question presented for review, he complains that Article 35.16(b)(1) of the Texas Code of Criminal Procedure is facially unconstitutional under the Sixth Amendment. *See* Petition at 17-23. As noted above, that statute permits the prosecution to challenge a prospective capital juror for cause where "the juror has conscientious scruples in regard to the infliction of the punishment of death for crime." TEX. CRIM. PROC. CODE ANN. art. 35.16(b)(1) (Vernon1996). According to Ortiz, this law effectively disqualifies jurors who voice only general objections to the death penalty and is therefore inconsistent with this Court's decisions in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and *Wainwright v. Witt*, 469 U.S. 412 (1985). He also argues that the trial court applied the defective statute to his case and improperly excused several qualified jurors.

However, as discussed below, Ortiz' facial challenge to Article 35.16 must fail because the Texas courts have construed the statute to permit venire members to be disqualified *only* to the degree constitutionally allowed by *Witt*. Furthermore, to the extent Ortiz seeks review of the manner in which the statute was applied to the jurors in his case, the Court of Criminal Appeals found his claims to be procedurally defaulted under the Texas contemporaneous objection rule. This Court therefore does not have jurisdiction to consider Ortiz' "as applied" challenge. For

these reasons, certiorari review should be denied.

A. Under the Court of Criminal Appeals' construction of Article 35.16(b)(1), a prospective capital juror may only be disqualified from service based on "conscientious scruples" where the juror's views on capital punishment would prevent or substantially impair the performance of her duties.

Ortiz' facial constitutional challenge to Article 35.16(b)(1) relies entirely on this Court's decisions in *Witherspoon* and *Witt*. In *Witherspoon*, this Court was faced with an Illinois statute which permitted a prospective capital juror who indicated "that he [had] conscientious scruples against capital punishment, or that he opposed the same," to be challenged for cause. 391 U.S. at 512. Pursuant to the statute, the State was routinely allowed to excuse jurors who expressed such reservations without specifically inquiring into whether those scruples would compel them to vote against the death penalty. *Id.* at 515. The Court determined that such a practice was improper and held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general opposition to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 521-22 (footnote omitted).

In *Adams v. Texas*, 448 U.S. 38 (1980), the Court further clarified the standard to be used for assessing the propriety of a challenge for cause. That case involved the former Texas statute which prescribed that "'[a] prospective [capital] juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.'" *Id.* at 42 (quoting TEX. PENAL CODE ANN. § 12.31(b) (Vernon 1974)). The *Adams* Court concluded that the *Witherspoon* line of cases established

"the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 45. However, the Court went on to hold that the Texas statute at issue had been applied to the petitioner's case in such a way as to exclude jurors who were qualified to serve under *Witherspoon*. *Id.* at 49-51. In particular, the state courts had interpreted the statute so broadly that the prosecution had excluded venire members "who stated that they would be 'affected' by the possibility of the death penalty, but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally." *Id.* at 49 (footnote omitted). The Court found that this expansive application of the statute could not be squared with the Sixth Amendment. *Id.* at 50.

In *Wainwright v. Witt*, this Court further refined the standard that had been "simplified" in *Adams* for evaluating a challenge for cause. *Witt*, 469 U.S. at 421. The Court summarized the governing rule as follows:

> Th[e] standard [for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment] is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with *Witherspoon*'s reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved:

> many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. . . . [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Id. at 424-26 (internal footnotes omitted).

Turning to the instant case, it is apparent that the Texas statute passes constitutional muster. After *Adams* was decided, the Court of Criminal Appeals narrowed its construction of section 12.31(b) of the Penal Code so that it "[could not] be used . . . to exclude jurors on grounds broader than those permitted by the Supreme Court in *Witherspoon v. Illinois*." *Penry v. State*, 691 S.W.2d 636, 656 (Tex. Crim. App. 1985); *see also Clark v. State*, 881 S.W.2d 682, 686 (Tex. Crim. App. 1994); *White v. State*, 610 S.W.2d 504, 508 (Tex. Crim. App. 1981). The state courts concluded that *Adams* did not declare section 12.31(b) facially unconstitutional, but simply admonished the State because the statute had been applied too broadly.[2] *Clark*, 881 S.W.2d at 686; *Penry*, 691 S.W.2d at 656; *White*, 610 S.W.2d at 508. Nevertheless, in 1991, the Texas Legislature deleted the language confronted by the *Adams* Court. *Clark*, 881 S.W.2d at 685 n.1.

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[2]In *Adams*, the Court specifically noted that "the State could, consistently with *Witherspoon*, use § 12.31(b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But the use of § 12.31(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible." *Adams*, 448 U.S. at 48-49.

Article 35.16(b)(1) then became the only statutory basis for excluding prospective capital jurors who opposed the death penalty. As with section 12.31(b), the Court of Criminal Appeals has consistently interpreted the "conscientious scruples" provision of this statute to permit a venire member to be disqualified from service in a capital case *only* where the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Holberg v. State*, 38 S.W.3d 137, 141 (Tex. Crim. App.), *cert. denied*, 534 U.S. 972 (2001) (citing *Witt*, 469 U.S. at 424); *see also Ortiz*, 93 S.W.3d at 88; *Ramos v. State*, 934 S.W.2d 358, 366 (Tex. Crim. App. 1996); *McFarland v. State*, 928 S.W.2d 482, 509 n.24 (Tex. Crim. App. 1996); *Wolfe v. State*, 917 S.W.2d 270, 275-76 (Tex. Crim. App. 1996); *Cuevas v. State*, 742 S.W.2d 331, 334 (Tex. Crim. App. 1987). Thus, the statute is coextensive with this Court's opinions in *Adams* and *Witt*. If a juror is qualified to serve under the constitutional standard articulated in those cases, he is likewise qualified to serve under Texas law. *See Ramos*, 934 S.W.2d at 365; *McFarland*, 928 S.W.2d at 509 n.24. Put another way, a juror cannot be disqualified under Article 35.16(b)(1) if he is acceptable under *Adams* and *Witt*. *Ortiz*, 93 S.W.3d at 88; *Ramos*, 934 S.W.2d at 365. Because the Texas courts have tethered the statute's requirements to the constitutional standards announced by this Court, it survives a facial constitutional challenge.[3] Ortiz' argument to the contrary is therefore without merit and undeserving of certiorari review.

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[3]Citing *Houston v. Hill*, 482 U.S. 451 (1987), Ortiz maintains that the Article 35.16(b)(1) is simply "not susceptible to a narrowing construction." Petition at 21. However, contrary to Ortiz' argument, it is completely reasonable for the Court of Criminal Appeals to define "conscientious scruples" as denoting views that would "prevent or substantially impair" a juror in the performance of his duties. After all, the phrase "conscientious scruples" is hardly self-defining. *See Witherspoon*, 391 U.S. at 515 n.9 (noting of a statute that permitted jurors to be excused based on "conscientious scruples" that "[w]hat matters is how [the phrases employed in this area] might be understood – or misunderstood – by prospective jurors").

B. This Court may not consider Ortiz' allegation that prospective jurors in his case were improperly excluded under *Witt* because the lower court's disposition of the claim was based on an adequate and independent state procedural ground.

Although Ortiz repeatedly characterizes the argument included in his petition as a "facial" challenge to the constitutionality of Article 35.16(b)(1), he also contends that the statute was improperly utilized to exclude thirteen prospective jurors in his case who were qualified to serve under *Witherspoon* and *Witt*. *See* Petition at 17-23. Ortiz seems to imply that the Court of Criminal Appeals simply ignored this additional complaint. *See, e.g., id.* at 19 ("Despite what it says, the Court of Criminal Appeals did not apply a narrowing construction to Article 35.16(b)1 in Petitioner's case"). However, a simple reference to the lower court's decision reveals that the court declined to consider the merits of Ortiz' "as applied" claim because of an independent state procedural default. The Texas court found that with regard to the thirteen jurors cited by Ortiz, "Ortiz did not object to the trial court's actions in granting the State's challenges." *Ortiz*, 93 S.W.3d at 88. For this reason, the court concluded that Ortiz had forfeited his claims:

> A party must object to the granting of a challenge for cause before he can complain of that action on appeal. Because Ortiz failed to object, his complaints were not preserved with respect to all the challenges. . . .

Id. This holding precludes independent review of Ortiz' constitutional allegations by this Court.

It is well settled that "this Court 'will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.'" *Lambrix v.*

Singletary, 520 U.S. 518, 522-23 (1997) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *see also Harris v. Reed*, 489 U.S. 255, 262 (1989) (holding that an adequate and independent state procedural default will bar federal habeas review of a claim absent a showing of cause and prejudice). This is so because the Court "in fact lack[s] jurisdiction to review such independently supported judgments on direct appeal: Since the state-law determination is sufficient to sustain the decree, any opinion of this Court on the federal question would be purely advisory." *Lambrix*, 520 U.S. at 523 (citing *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945)); *see also Sochor v. Florida*, 504 U.S. 527, 533 (1992) (noting and applying rule that "this Court lacks jurisdiction to review a state court's resolution of an issue of federal law if the state court's decision rests on an adequate and independent state ground"); *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision").

Ortiz does not contest that the Texas contemporaneous objection rule constitutes an adequate and independent state procedural ground. Indeed, as the Fifth Circuit has repeatedly and correctly emphasized, this aspect of Texas law is firmly established and regularly followed by the state courts. *Smith v. Cockrell*, 311 F.3d 661, 683 (5th Cir. 2002); *Haley v. Cockrell*, 306 F.3d 257, 262 n.8 (5th Cir. 2002); *Styron v. Johnson*, 262 F.3d 438, 453 (5th Cir. 2001), *cert. denied*, 534 U.S. 1163 (2002); *Jackson v. Johnson*, 194 F.3d 641, 652 (5th Cir. 1999); *Fisher v. Texas*, 169 F.3d 295, 300 (5th Cir. 1999); *Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998); *Sharp v. Johnson*, 107 F.3d 282, 285-86 (5th Cir. 1997); *see also Wainwright v. Sykes*, 433 U.S. 72, 88 (1977) (noting the important function served by a state's contemporaneous objection rule). This Court may therefore not undertake review of this aspect of the lower court's decision and

certiorari review should be denied.[4]

III. The Lower Court Correctly Declined To Find That Ortiz' Trial Attorney Had Rendered Ineffective Assistance Of Counsel Based On The Record Presented During Direct Appeal.

In an apparent attempt to circumvent the state procedural bar, Ortiz argues that his trial attorney rendered ineffective assistance of counsel when he did not object to the prosecution's challenges for cause to the thirteen prospective jurors cited above.[5] *See* Petition at 23-26. He maintains that the record from voir dire reveals that his lawyers "clearly were unfamiliar with the decisions

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[4]Even if Ortiz' allegations were not jurisdictionally barred, they are without any substantive merit. The record reveals that the trial court specifically advised jurors that its inquiry was meant to identify whether any of the assembled venire members "believe[d] that the death penalty should never be inflicted in any case, regardless of what the evidence might be." 11 RR 65-66. All of the jurors identified in Ortiz' petition came forward in response to the court's question and expressed unwavering opposition to imposing capital punishment. *Id.* at 67-81. Twelve of the jurors explicitly confirmed that they would oppose the death penalty in any circumstance. *Id.* Only one juror, Andy Reid, simply answered "yes" to the court's question as to whether he had "conscientious scruples" regarding the death penalty. *Id.* at 67. However, Reid was the first venire member questioned by the court, immediately after the court had explained that by "conscientious scruples" it meant to reveal only those jurors who "believe[d] that the death penalty should never be inflicted in any case, regardless of what the evidence might be." The court was plainly in the best position to evaluate each venire member's demeanor and responses and to find those individuals unable to follow the law. *See Witt*, 469 U.S. at 424-26. In these circumstances, and absent any objection or questions from the defense, this Court must defer to the conclusions of the trial court.

[5]To the extent that Ortiz' Sixth Amendment claim is an attempt to show "cause and prejudice" for the state default, this argument is inappropriate in the context of a direct appeal. Although cause and prejudice may excuse a state procedural default on federal habeas corpus review of a state criminal conviction, *see, e.g., Coleman*, 501 U.S. at 750-51, no such excuse is available to a defendant seeking review by this Court through direct appeal of the state court's judgment. *See Lambrix*, 520 U.S. at 523; *Sochor*, 504 U.S. at 533; *Long*, 463 U.S. at 1041.

of this Court in *Witherspoon* and *Witt*, and therefore did not realize that Article 35.16(b)1 was unconstitutional on its face." *Id.* at 24. Ortiz argues that by failing to object to the exclusion of the various venire members, the prosecution was able to successfully stack the jury with "those who possessed the unwavering view that imposition of a death sentence was necessary in the event Petitioner's guilt were proven." *Id.* at 26. However, as discussed below, the venire members excused for cause were properly challengeable under *Witt*. Counsel was therefore not ineffective for failing to make a frivolous objection to their dismissal. Moreover, because the record on direct appeal is silent regarding why counsel did not challenge the disqualifications, the Court of Criminal Appeals correctly concluded that Ortiz had presented insufficient evidence to overcome the presumption that counsel's tactics constituted reasonable professional assistance.

A. The *Strickland* Standard

To prevail on a claim of ineffective assistance of counsel, a defendant bears the burden of satisfying the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, *Strickland* requires a defendant to show both (1) that counsel rendered deficient performance, and (2) that counsel's actions resulted in actual prejudice. *Id.* at 687; *see also Bell v. Cone*, 122 S. Ct. 1843, 1850 (2002); (*Terry*) *Williams v. Taylor*, 529 U.S. 362, 390 (2000). Failure to meet either element of the *Strickland* test will defeat an ineffective assistance of counsel claim, making it unnecessary to examine the other prong. *Strickland*, 466 U.S. at 687.

To establish deficient performance under *Strickland*, a defendant must show that, in light of all the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," *i.e.*, "prevailing professional norms." *Id.* at 688-90; *see also Nix v. Whiteside*, 475 U.S. 157, 165 (1986). This Court has admonished that judicial scrutiny of counsel's performance "must be highly deferential,"

with every effort made to avoid "the distorting effect of hindsight." *Strickland*, 466 U.S. at 689-90. Accordingly, there is a "strong presumption" that the challenged conduct "falls within the wide range of reasonable professional assistance," and the defendant is required to overcome the presumption that counsel's actions "might be considered sound trial strategy." *Id.* at 689.

Even if counsel's representation was deficient, the defendant must also affirmatively prove prejudice that is "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Id.* at 687. To meet this requirement, he must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *see also* (*Terry*) *Williams*, 529 U.S. at 393-95. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

B. Ortiz has failed to demonstrate that his attorney's performance fell below an objective standard of reasonableness.

The Texas courts have repeatedly indicated that ineffective assistance of counsel claims are generally disfavored on direct appeal.[6] In particular, the state court has explained that in order to defeat *Strickland*'s presumption of reasonable professional assistance, "any allegation of ineffectiveness must be firmly

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[6]Texas is not alone in this conclusion. Virtually every federal circuit court has also indicated that ineffectiveness claims should be brought in a collateral attack rather than on direct appeal. *See, e.g., United States v. Cofske*, 157 F.3d 1, 2 (1st Cir. 1998); *United States v. Jake*, 281 F.3d 123, 132 n.7 (3d Cir. 2002); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997); *United States v. Rivas*, 157 F.3d 364 (5th Cir. 1998); *United States v. Neuhausser*, 241 F.3d 460, 474 (6th Cir. 2001), *cert. denied*, 534 U.S. 879 (2001); *United States v. Evans*, 272 F.3d 1069, 1093 (8th Cir. 2001), *cert. denied*, 535 U.S. 1029 (2002); *United States v. Rewald*, 889 F.2d 836, 859 (9th Cir. 1989); *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc); *United States v. Griffin*, 699 F.2d 1102, 1107-09 (11th Cir. 1983); *United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999).

founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). However, "[i]n the majority of cases, the record on direct appeal is undeveloped and cannot adequately reflect the motives behind trial counsel's actions." *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001) (footnote omitted); *see also Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000) ("[W]e are mindful that only in rare cases will the record on direct appeal be sufficient for an appellate court to fairly evaluate [an ineffective assistance] claim") (citation omitted); *Thompson*, 9 S.W.3d at 813 ("Rarely will a reviewing court be provided with the opportunity to make its determination on direct appeal with a record capable of providing a fair evaluation of the merits of a claim involving such a serious allegation") (footnote omitted); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) ("In most cases, the record on direct appeal is inadequate to develop an ineffective assistance of counsel claim"). The Texas courts have therefore concluded "that a post-conviction writ proceeding. . . is the preferred method for gathering the facts necessary to substantiate such a Sixth Amendment challenge."[7] *Robinson*, 16 S.W.3d at 810 (citations omitted); *see also Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998) (noting that because record on direct appeal is usually insufficient to adequately reflect failings of trial counsel, appellate court will not apply general doctrine that forbids raising a claim on habeas review after it was rejected on appeal).

In the instant case, the Court of Criminal Appeals plainly concluded that, by relying solely on the transcript from voir dire,

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[7]Of course, where a ineffective assistance of counsel claim may be adequately resolved from the trial record, Texas appellate courts will address the claim in the first instance. *See Robinson*, 16 S.W.3d at 813 n.7. Indeed, where a state habeas petitioner attempts to assert a claim during post-conviction proceedings that is based entirely on the record that is amassed during direct appeal, his allegations are generally considered procedurally defaulted. *See, e.g., Ex parte Gardner*, 959 S.W.2d 189, 199 (Tex. Crim. App. 1998); *Ex parte Goodman*, 816 S.W.2d 383, 385 (Tex. Crim. App. 1991).

Ortiz had presented insufficient evidence to overcome the "strong presumption" of reasonable assistance by trial counsel:

> If counsel's reasons for his conduct do not appear in the record and there is at least the possibility that the conduct could have been legitimate trial strategy, we will defer to counsel's decisions and deny relief on an ineffective assistance claim on direct appeal. Counsel's reasons for failing to object do not appear in the direct appeal record. And it is possible for counsel to have legitimate reasons for declining to object to a trial court's granting of a State's challenge for cause. Accordingly, we deny relief on Ortiz' ineffective assistance claims.

Ortiz, 93 S.W.3d at 88-89 (internal footnotes omitted). This judgment is patently reasonable. In the absence of a full factual record, a court may not presume that counsel's actions in these circumstances were deficient.[8] *See Strickland*, 466 U.S. at 689 (emphasizing that a "strong presumption" exists that challenged conduct "falls within the wide range of reasonable professional assistance").

Counsel could have had any number of legitimate, strategic reasons for not objecting to the disqualification of the jurors identified by Ortiz. For instance, counsel could have quite reasonably concluded that all thirteen jurors were challengeable

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[8]Ortiz incorrectly asserts that the Court of Criminal Appeals abandoned *Strickland*'s objective inquiry in favor of an analysis of counsel's subjective motivations. *See* Petition at 25. Rather, the lower court specifically stated that it only required evidence of counsel's decisionmaking where "*there is at least the possibility that the* [*challenged*] *conduct could have been legitimate trial strategy*." *Ortiz*, 93 S.W.3d at 88. In other words, unless counsel reveals otherwise, the court properly assumes that an attorney's performance is not deficient where legitimate, strategic reasons could exist for an attorney's actions.

under *Witt*.[9] In fact, prior to the questioning initiated by the trial court, the presiding judge specifically advised the venire panel that his question regarding "conscientious scruples" was meant to identify only those jurors who, "whether for religious or philosophical or any other reason . . . believe that the death penalty *should never be inflicted in any case, regardless of what the evidence might be.*" 11 RR 65-66 (emphasis added). All thirteen jurors responded to this invitation and affirmed their unwavering opposition to the death penalty. *Id.* at 67-81. Although the individual inquiries were brief, in the context of the court's examination and for the reasons apparent to both the parties and the court at trial, counsel could have reasonably concluded that the jurors were legitimately excused under this Court's Sixth Amendment precedent. Concomitantly, counsel could have concluded that some or all of the thirteen venire members would not have made favorable jurors for other reasons. The lower court therefore correctly concluded that Ortiz had failed to overcome the presumptions imposed by *Strickland*. Because there is nothing in the record to support a finding that counsel was deficient, certiorari review should be denied.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

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[9]Ortiz speculates that his attorney was not familiar with this Court's decisions in *Witherspoon* and *Witt*. *See* Petition at 24. However, this suggestion is belied by the record. Trial counsel specifically objected to the trial court's decision to grant the State's challenge for cause regarding two jurors who initially wavered regarding whether they could personally impose the death penalty. *See* 11 RR 77-80. With one of the jurors, counsel specifically tried to rehabilitate her answer by asking whether, in an appropriate case, she could ever "make the proper findings so that the death penalty would be imposed[.]" *Id.* at 78. Clearly, counsel was familiar with the fact that jurors were required to have more than generalized objections to the death penalty before they could be excused for cause.

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